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91-17

NO. .....

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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THE ESTATE OF FLOYD COWART

Petitioner

VERSUS

NICKLOS DRILLING COMPANY, and

COMPASS INSURANCE COMPANY

Respondents

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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Respectfully Submitted,

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QUESTION PRESENTED FOR REVIEW

Whether, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., a compromise by a claimant with a third party tortfeasor, without the express written approval of his employer/carrier, serves to preclude said claimant from future compensation benefits, irrespective of whether the employer/carrier knew of the compromise, and irrespective of whether the employer/carrier was either paying claimant compensation benefits, or was under judicial mandate to pay such compensation benefits, at the time of the compromise.

LIST OF PARTIES

A. The following are entities interested in the outcome of this case.

1. Compass Insurance Company (Carrier)

2. Nicklos Drilling Company (Employer)

3. Estate of Floyd Cowart (Claimant)

4. Director, Office of Workers' Compensation Programs
United States Department of Labor

5. Lloyd N. Frischhertz, Seelig, Cosse', Frischhertz & Poulliard (Attorney for Claimant)

B. The following are names of opposing law firms and/or counsel in this case:

1. Mr. H. Lee Lewis, Jr., of GRIGGS & HARRISON, Post Office Box 4616, Houston, Texas, 77210-4616

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OPINIONS BELOW

The Decision and Order of Administrative Law Judge Parlen L. McKenna in this case was rendered on November 25, 1986, and is published at 19 BRBS 457.

The Opinion of the Benefits Review

Board was rendered on October 31, 1989 and is published at 23 BRBS 42.

The Judgment of the United States Court of Appeals for the Fifth Circuit was rendered on August 9, 1990, and is published at 907 F.2d 1552.

The Decision of the United States Court of Appeals to allow rehearing en banc was issued on November 6, 1990.

The Judgment of the United States Court of Appeals, en banc, was rendered on March 29, 1991, and is published at 927 F.2d 828.

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STATEMENT OF JURISDICTION

The opinion and judgement of the en banc panel of the United State Court of Appeals for the Fifth Circuit was rendered on March 29, 1991. This

petition for writ of certiorari was filed within 90 days of March 29, 1991, as required by 28 U.S.C. 2101(c) and Rule 13.1 of the Supreme Court Rules. Jurisdiction is invoked under the provisions of 28 U.S.C. 1254(1).

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STATUTE INVOLVED

The Statute involved in this case is Section 933(g) of the Longshore and Harbor Workers' Compensation Act which reads in its entirety:

(g) Compromise obtained by person entitled to compensation.

(1) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter the employer shall be

liable for compensation determined in subsection (f) of this section only if written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within days after such compromise is made.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. 933(g).

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STATEMENT OF THE CASE

(i) Disposition below:

This case arises out of a claim by Floyd Cowart for benefits pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et. seq. Cowart sustained an injury in the course and scope of his employment with Nicklos Drilling Company.

Administrative Law Judge, Parlen L. McKenna, entered an order on November 25, 1986, awarding Cowart benefits. 19 B.R.B.S. 457. Nicklos Drilling Company appealed to the Benefits Review Board. On October 31, 1989, the Board affirmed Judge McKenna's award. 23 B.R.B.S. 42.

On August 9, 1990, a three judge panel of the United States Court of Appeals for the Fifth Circuit reversed

the findings of Judge McKenna as affirmed by the Board. Cowart timely petitioned the Fifth Circuit for a Rehearing En Banc, which was granted on November 6, 1990. On March 31, 1991, the Fifth Circuit, ruling en banc, affirmed the panel's decision.

(ii) Statement of Facts

On July 20, 1983, Floyd Cowart was injured while working for Nicklos Drilling Company on Rig 81, a Transco Exploration Company platform located on the outer continental shelf. Cowart's injury occurred when a mud tank crushed his hand during movement of the tank by a crane. In addition to the crush injury, Cowart also lost the distal half of his thumb. After several months of treatment, Cowart reached maximum medical

improvement on May 21, 1984. Accordingly, on May 25, 1984, Cowart's physician released him to return to work, assessing a forty percent partial disability rating, based on the loss of the distal half of his thumb and residual synovitis in the flexor tendons.

Immediately after his injury, Cowart made a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq. Cowart received temporary total disability benefits from July 21, 1983, the date of his accident, through May 21, 1984, the date he reached maximum medical improvement. As Cowart had sustained a scheduled injury under Section 8(c)(6) of the Act, he was automatically entitled to two thirds of his average weekly wage for

a seventy five week period, commencing on the date of maximum medical improvement; May 22, 1984. While Nicklos acknowledged liability for these schedule benefits, and indeed was instructed by the Director to pay said benefits; Nicklos never paid these benefits to Cowart.

Meanwhile, Cowart had filed suit in the United States District Court for the Eastern District of Louisiana against Transco, the third party and owner of the rig, for its negligence in causing the accident. On July 1, 1985, more than thirteen months after the schedule payments were supposed to have started, Cowart settled his third party claim with Transco. This settlement was funded entirely by Nicklos pursuant to an indemnification agreement between Nicklos

and Transco. Thus, Nicklos not only had notice of the settlement between Cowart and Transco, but actually paid the settlement to Cowart.

Cowart's compensation claim under the Act proceeded to administrative hearing on November 25, 1986. Nicklos argued that Cowart forfeited his claim for compensation because Cowart failed to obtain Nicklos' written approval of the settlement, pursuant to Section 933(g) of the Act. Administrative Law Judge Parlen L. McKenna held that Section 933(g) did not preclude compensation benefits under the fact situation at bar; Nicklos' participation in the settlement agreement sufficed as notice under Section 933(g)(2) irrespective of the fact that Nicklos' written approval was not

garnered.

The Benefits Review Board affirmed McKenna's decision and the matter was appealed to the United States Court of Appeals for the Fifth Circuit. On August 9, 1990, a panel reversed the Administrative Law Judge and the Benefits Review Board, holding:

> "... there are no exceptions whatever to the "unqualified" language of Section 933. Rather, "the employer shall be liable for compensation ... only if written approval of the settlement is obtained from the employer and the employer's carrier ..."

As this holding conflicted with prior precedent of the Fifth Circuit, Cowart filed for Rehearing En Banc which was granted on November 6, 1990. Sitting en banc, the Fifth Circuit affirmed the panel's decision on March 31, 1991.

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ARGUMENT

Introduction

The intent of the Longshore and Harbor Workers' Compensation Act, 933 U.S.C. 901, et. seq. is to compensate injured longshore and harbor workers for injuries suffered in the course and scope of their employment. Congress intended, and the Supreme Court has held, that the Act should be construed in order to further its purpose of compensating longshoremen and harbor workers, "and in a way which avoids harsh and incongruous results." Voris v. Eikel, 346 U.S. 328, 333 (1953); Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249, 268 (1977).

In keeping with this legislative intent, Section 933(g) of the Act

provides that the employer be notified prior to any settlement between an injured worker and a third party. As the Fifth Circuit succinctly pointed out in Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644 (5th Cir. 1986), the legislative intent behind Section 933(g) was twofold, namely:

> 1). To protect the employer's right to directly recover its compensation liability from the third party tortfeasor; and
>
> 2). To protect the employer's statutory right to a set-off against its compensation liability for any amount received by the employee from the third party tortfeasor.
>
> Collier, supra at 646.

This intent, enunciated by the Collier court, is clearly in keeping

within the overall intent of the Act as set forth in Voris, supra and Northeast Marine, supra. Section 933(g) was enacted to encourage employers to pay their compensation liability, by preserving those employer's right to recover such payments from a third party tortfeasor. By requiring notification of any third party settlement, Section 933(g) ensures employers that settlement will not be confected without their approval, thereby alleviating the employers' fear that they will not be recompensed for compensation benefits paid by themselves, but ultimately deemed owed by a third party.

The question that arises is whether Section 933(g) was intended to provide equal protection, both to those employers

who are fulfilling the intent of the Act by paying the claimant compensation benefits at the time of the third party settlement; and those employers who are not fulfilling the intent of the act by withholding such compensation benefits. By protecting those employers who are paying the claimant compensation benefits at the time of settlement, Section 933(g) encourages employers to fulfill their obligation under the Act. Interpreting Section 933(g) to provide equal protection to those employers who are withholding such compensation benefits would not only circumvent Congress' intent to encourage employers to promptly compensate longshore and harbor workers, but would have the converse effect of encouraging employers to withhold

compensation benefits until such time as they are judicially ordered to pay such benefits. In any case in which the possibility of settlement arose, the employer could withhold compensation benefits, and withhold written approval of a settlement agreement, in hopes of ultimately avoiding the payment of any compensation whatsoever. There would be no means to protect a claimant against such withholding. Such an interpretation is clearly contrary to the underlying intent of the Act.

An alternative interpretation, and the one urged by petitioner in the captioned matter, is to read Section 933(g) as providing different levels of protection for the two classes of employers. Under this interpretation,

Section 933(g) would be interpreted as requiring written approval by an employer who was paying compensation at the time of the third party settlement, and as requiring notification to an employer who was not paying compensation at the time of the third party settlement. Such an interpretation would serve to reinforce the underlying intent of Section 933(g), i.e., encouraging employers to promptly pay compensation benefits, by affording such employers greater protection; while conversely mitigating the potential abuse of Section 933(g), by affording lesser protection to those employers who are not paying compensation benefits.

The precise issue before this Court is whether a compromise by a claimant with a third party tortfeasor, without

the express written approval of his employer/carrier, serves to preclude said claimant from future compensation benefits, irrespective of whether the employer/carrier knew of the compromise, and irrespective of whether the employer/carrier was either paying claimant compensation benefits, or was under judicial mandate to pay such compensation benefits, at the time of the compromise.

The Fifth Circuit has now unilaterally overruled over fifteen years of administrative and Benefits Review Board decisions. Some of those decisions overruled had been affirmed, by both the Fifth and Ninth Circuits, creating a clear conflict in the law of the various circuits. (This writer knows of no other

federal circuits which have ruled on the issue). Further, the Fifth Circuit's decision is contrary to the interpretation of Section 933(g) given by the Director, Office of Worker's Compensation Programs, an opinion that has been accorded judicial deference. Finally, the Fifth Circuit's decision ignores the clear wording of Section 933(g), as interpreted through the rules of statutory construction enunciated by this Court.

The effect of the Fifth Circuit's decision is sure to be devastating to literally hundreds of thousands of claimants, past, pending and future. Indeed, since the rendering of this decision, one Sixth Compensation District employer, Ingalls Shipbuilding, has moved

to dismiss over 3,000 pending claims. The hardest hit claimant's will be those with occupational diseases; the Fifth Circuit decision will render their ability to pursue both compensation and tort remedies simultaneously, a right guaranteed under the Act, virtually nonexistent. These, and other claimant's affected by the decision, will be stripped of their right to compensation, and thereby be thrust upon the already overwhelming number of disabled being currently supported by this country's welfare and social security systems.

History of 933(g):

Any case involving statutory interpretation necessarily begins with a discussion of the history of the statute. From 1927 until 1972, Section 933(g) read

substantially as follows:

> "(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if such compromise is made with his written approval."
>
> 44 Stat. 1441; 73 Stat. 392.

There is a dearth of cases construing Section 933(g) during this period. The leading cases are Chapman v. Hoage, 296 U.S. 526, 56 S.Ct. 333 (1936) (933(g) does not bar a claim for compensation unless the carrier is actually prejudiced by the claimant's failure to prosecute his third party action); Banks v. Chicago Grain Trimmers Association, 390 U.S. 459, 88 S.Ct. 1140

(1968) (claimant's consent to a court ordered remittitur is not a compromise within the meaning of 933(g) because the employer's interest was protected by the trial court in ordering the remittitur); and Bell v. O'Hearne, 284 F.2d 777 (4th Cir. 1960) (after claimant's third party action was tried to judgment, settling for a lesser amount was not a compromise as long as the employer was credited for the full amount, because the employer's interest was fully protected).

The paucity of court litigation involving Section 933(g) prior to 1972 is not unusual given the primary purpose of the 1972 amendments to the Act. The primary purpose of the 1972 amendments was to limit the available actions in tort for persons covered by the Act in

exchange for increasing compensation benefits. Prior to 1972, claimant's were allowed a greater variety of third party tort actions against a larger class of potential defendant's, including the claimant's employer. Consequently, claimant's third party actions usually settled for a much greater amount than similar actions following the amendment's.

In 1972 Section 933(g) was amended to provide in pertinent part:

> (g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter the employer shall be liable for compensation determined in subsection (f) of this section only if written approval of such compromise is obtained from the employer and its insurance carrier

> by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within days after such compromise is made.

33 U.S.C. 933(g).

Since 1972, the above underlined portion of Section 933(g) has been interpreted by numerous administrative and judicial tribunals, with the same result.

The issue was first faced by the administrative law judge in O'Leary v. Southeast Stevedore Company, 5 BRBS 16 (1976). In O'Leary the administrative law judge noted that Section 933(g) "presuppose[s] that compensation is not only payable under the Act, but that both claimant and respondent accept that compensation is payable." Id. at 24.

The decision continued:

> "Only when the decision of the Benefits Review Board and the Order of Judge Bernstein pursuant to that Decision were not appealed, was Claimant's status as such a person assured. Until that time she did not know and Respondent's did not know if she was a person entitled to compensation."

Id. at 25.

Thus, the O'Leary judge held:

> "Entitled to compensation means presently recognized as entitled to compensation; it does not mean one who, after arduous years of litigation may finally be declared to be entitled to compensation. The permission of the employer and its carrier to settle a third party action must be obtained only where compensation benefits are acknowledged. Congress did not intend that permission to settle a third party action must be obtained from a Respondent who (although with apparently valid reason) denies any responsibility to make compensation benefits."

Id.

In upholding the administrative law

judge's determination, the Benefits Review Board noted that a different interpretation:

> "could result in a claimant not being paid compensation, yet the claimant would be afraid to make a third party settlement for in doing so he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . ."

7 BRBS 144, 149 (1977).

Thus, the Benefits Review Board reasoned that "the very language [of Section 933(g)] contemplat[es] that [the] employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination." Id. at 148. Since the original Administrative Law Judge decision, O'Leary has remained the

seminal law concerning applicability of Section 933(g).[1]

[1] See eg. O'Leary, 5 BRBS 161 (ALJ, 1976), 7 BRBS 144 (1977), aff'd. mem. 622 F.2d 596 (9th Cir. 1980)(unpublished); Caranante v. International Terminal Operating Company, Inc., 7 BRBS 248 (1977); Wall v. Wall, 15 BRBS 197 (ALJ, 1982); Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982), aff'd. mem. 729 F.2d 757 (5th Cir. 1984)(unpublished); Todd v. J & M Welding Contractors, 16 BRBS 434 (ALJ, 1984); Wilson v. Triple A Machine Shop, 17 BRBS 471 (ALJ, 1985); Lindsay v. Bethlehem Steel Corporation, 18 BRBS 20 (1986), 22 BRBS 206 (1989); Dorsey v. Cooper Stevedoring Company, Inc., 18 BRBS 25 (1986); Nesmith v. Farrell American Station, 19 BRBS 176 (1986); Cernousek v. Braswell Shipyards, Inc., 19 BRBS 796 (ALJ, 1987); Quinn v. Washington Metropolitan Area Transit Authority, 20 BRBS 65 (1986); Lewis v. Norfolk Shipbuilding and Dry Dock Corporation, 20 BRBS 126 (1987); Evans v. Horne Brothers, Inc., 20 BRBS 226 (1988); Mobley v. Bethlehem Steel Corporation, 20 BRBS 239 (1988), aff'd. 24 BRBS 49, 920 F.2d 558 (9th Cir. 1990); Blake v. Bethlehem Steel Corporation, 21 BRBS 49 (1988); Castorina v. Lykes Brothers Steamship Company, Inc., 21 BRBS 136 (1988); Anweiler v. Avondale Shipyards, Inc., 21 BRBS 271

The Federal Circuit's interpretation of Section 933(g):

> The O'Leary decision was subsequently affirmed by the Ninth Circuit. 622 F.2d 595 (9th Cir. 1980)(unpublished, reproduced in its entirety in appendix). In affirming the decision, the Ninth Circuit held:
>
> "Here, Southeast 1) never paid compensation voluntarily or pursuant to an award and 2) disclaimed any interest in Mrs. O'Leary's third

(1988); Armand v. American Marine Corporation, 21 BRBS 305 (1988); Fisher v. Todd Shipyards Corporation, 21 BRBS 323 (1988); O'Berry v. Jacksonville Shipyards, Inc., 21 BRBS 355 (1988); Cunningham v. Kaiser Steel Corporation, 21 BRBS 154 (ALJ, 1988); Picinich v. Lockheed Shipbuilding, 22 BRBS 289 (1989); Glenn v. Todd Pacific Shipyards Corp., 22 BRBS 254 (ALJ, 1989); Sellman v. I.T.O. Corporation of Baltimore, 24 BRBS 11 (1990); Cretan v. Bethlehem Steel Corporation, 24 BRBS 35 (1990); Reaux v. H & H Welders & Fabricating, 24 BRBS 7 (ALJ, 1990).

party claim even though fully aware of the proposed settlement.

The dominant purpose of the Longshoremen's Act is to aid injured longshoremen and their dependents. Reed v. Yaka, 373 U.S. 410 (1963). The Board's ruling is reasonable and furthers the underlying purpose of the Act."

Id. at 3.

The Fifth Circuit faced the issue four years after O'Leary in Kahny v. Director, United States Dept. of Labor and Arrow Contractors of Jefferson, Inc., 15 B.R.B.S. 212, aff'd mem. 729 F.2d 757 (5th Cir. 1984)(unpublished, reproduced in its entirety in appendix). The Fifth Circuit held:

> "We find this analysis [O'Leary] fully consistent with the language, legislative history, and rationale of Section 933(g). The critical time for the determination whether one is a "person entitled to compensation" is the time of the challenged settlement. If, at that time, the employer is not making

> voluntary payments, and no award had been ordered by an ALJ, the claimant is not a "person entitled to compensation" under Section 933(g), and is not obliged to secure prior approval for a third party tort settlement."

Kahny, unpublished opinion at 7, 8.

Thus, by 1984, all the Federal Circuits who had ruled on the issue agreed with, and adopted, the O'Leary interpretation. In that year, Section 933(g) was amended. The 1984 amendments:

In 1984, Section 933(g) was amended by Congress. The 1984 amendments preserved pre-1984 Section 933(g), replete with the "persons entitled to compensation" language, and redesignated pre-1984 Section 933(g) as post-1984 Section 933(g)(1). The legislative history signifies no intent by Congress

to overrule the interpretation of Section 933(g) adopted by O'Leary and its progeny, including both the Fifth and Ninth Circuits. Congress is presumed to be aware of the administrative and judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. Lorillard v. Pons, 434 U.S. 575, 580, 98 S.Ct. 866, 870 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975); NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951).

Applying the above rule of statutory construction, the administrative law judge in Wilson v. Triple A Machine Ship, 17 BRBS 471 (ALJ, 1985) noted:

> "the key words for purposes of the O'Leary decision, supra, and the others following it are "the person entitled to compensation." . . . The 1984 amendment did not change this language. On the contrary, [Section 9]33(g) begins: "If the person entitled to compensation." . . . Thus it can be inferred that where a claimant is not being paid voluntarily or under an award he is not "a person entitled to compensation" and [Section 9]33(g)(1) does not apply."

Id. at 477.

Clearly, as Congress did not remove the "person entitled to compensation" language from Section 933(g), and the legislative history does not indicate any intent by Congress to overrule the O'Leary line of jurisprudence, the O'Leary definition of "person entitled to compensation remains viable.

Interpretation of Section 933(g)(2):

Given this, the only remaining issue before this Court, is whether the 1984 additions to Section 933(g), specifically, Section 933(g)(2), has any bearing on Petitioner's right to receive compensation. Section 933(g)(2) provides:

> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails

> to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.
>
> 33 U.S.C. 933(g)(2).

In construing this language, the Court is obliged to give effect, if possible, to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); U.S. v. Menasche, 348 U.S. 528, 538-539 (1955). In this regard it is noted that Section 933(g)(2) applies "regardless of whether the employer or the employer's insurer has made payment or acknowledged entitlement to benefits under this chapter." This language,

strikingly similar to the O'Leary language defining "persons entitled to compensation", is noticeably absent from Section 933(g)(1). By adding this language to Section 933(g)(2), Congress clearly intended to preserve the interpretation of Section 933(g)(1) by the courts in O'Leary and its progeny. This serves not only to buttress the continuing viability of O'Leary, but further signifies the legislature's intent to distinguish between those claimants who are "persons entitled to compensation" and those claimants who are not "persons entitled to compensation".

O'Leary's continued viability is further buttressed by Congress' continued use of the language "persons entitled to compensation" in Section 933(g)(1) after

1984, as opposed to Congress' use of the language "employee" in Section 933(g)(2). This language evidences an intent that Section 933(g)(1) apply only to those claimants who are "persons entitled to compensation", as defined in O'Leary, and that Section 933(g)(2) apply to all claimants who are "employees", irrespective of whether said employees are also "persons entitled to compensation". It is respectfully submitted that this attempt to distinguish the two classes of claimants indicates a clear intendment to codify the O'Leary distinction. This distinction between the two classes is evident throughout the amended Section 933(g) as will be discussed infra.

It is further noted that the notice

requirements of Section 933(g)(2) are disjunctive. A claimant's right to compensation benefits is forfeited under Section 933(g)(2): (1) if no written approval of the settlement is obtained and filed as required by paragraph 933(g)(1), or (2) if the employee fails to notify the employer of any settlement obtained from or judgement rendered against a third person.

The first disjunctive portion of Section 933(g)(2) applies to those claimants who did not acquire the written approval required by Section 933(g)(1). Since under O'Leary the only claimants required to acquire written approval by Section 933(g)(1) are "persons entitled to compensation", this first disjunctive portion makes Section 933(g)(2)

applicable to those "persons entitled to compensation" who did not comply with the written approval requirements of Section 933(g)(1). As Petitioner is not a "person entitled to compensation", this first portion of the disjunctive test does not serve to bring Petitioner within the purview of Section 933(g)(2).

However, the second disjunctive portion of Section 933(g)(2) does serve to bring Petitioner under the mandate of that Section. This test is not limited to those claimants who are required to obtain written approval under Section 933(g)(1), i.e. "persons entitled to compensation". Rather, this second portion applies to all claimants who are "employees", including, but not limited to, "persons entitled to compensation".

As Petitioner was an "employee" of Nicklos, he was required to fulfill the requirements of this second portion of the Section 933(g)(2) disjunctive test.

Notably, the second disjunctive portion of Section 933(g)(2) requires the "employee" to notify the employer of any settlement, as distinguished from the requirement of written approval imposed on "persons entitled to compensation" by Section 933(g)(1),. Indeed, the first portion of the Section 933(g)(2) disjunctive test raiterates Section 933(g)(1)'s requirement of written approval for "persons entitled to compensation". Clearly, this wording indicates an intent to distinguish between the type of notice required by the various classes of claimants. While

Section 933(g)(1) claimants, i.e. "persons entitled to compensation", are required to obtain written approval, the broader class of Section 933(g)(2) claimants, i.e. "employees", are required only to notify the employer.

As the administrative law judge in Wilson, supra noted:

> "The distinction between approval and notice is highlighted by the fact that settlement and judgement are mentioned in the same phrase: "if the employee fails to notify the employee of any settlement obtained from of judgment rendered against a third person ..." Notice of judgment makes sense; approval of judgment would not. In Banks, supra, the Supreme Court expressly held that a judge's action in reducing a jury's award adequately protected the employer's interest in the adequacy of the award -- and that is the only interest the employer has in the third party action.

Wilson, supra at 478.

A statute should be interpreted so as not to render any one part inoperative. Colautti v. Franklin, 439 U.S. 379, 392 (1977), citing, Menasche, supra at 538-539. To interpret Section 933(g)(2) any other way, would be to ignore this rule of statutory construction. This is clear once it is realized that the Section 933(g)(1) claimants, i.e. "persons entitled to compensation", necessarily fall into the broader class of Section 933(g)(2) claimants, i.e. "employees". Given this, to interpret Section 933(g)(2) as requiring written notification for all claimants, would render one of the disjunctive portions of the test inoperative. If Congress had intended this statutory interpretation, i.e.

'notify' = 'obtain written approval', than the second portion of the Section 933(g)(2) disjunctive test would have sufficed to cover the situation currently described in the first portion. By making Section 933(g)(2) disjunctive, Congress clearly intended to retain the distinction enunciated by O'Leary, and to further clarify O'Leary by proscribing the slighter burden required by claimants who were not "persons entitled to compensation" under Section 933(g)(1).

In Robinson Terminal Warehouse Corporation v. Adler, 440 F.2d 1060, 1062 (4th Cir. 1971), the court held as a matter of law that where the employer of an injured longshoreman issued a draft in payment of an agreed third party tort settlement, the employer approved of the

compromise for purposes of Section 933(g). In the captioned matter, Nicklos not only knew of the settlement between Petitioner and Transco, but actually paid said settlement. Thus, Petitioner has met the notification requirement of Section 933(g)(2), the forfeiture language of Section 933(g)(2) was not triggered, and Petitioner's claim for compensation was left intact.

The above enunciated interpretation of Section 933(g)(2) has been accepted by the Benefits Review Board in Dorsey v. Cooper Stevedoring, Inc., 18 B.R.B.S 25 (1986) and Pinell v. Patterson Service, 22 B.R.B.S. 61 (1989).

In Dorsey, the Board addressed the effect of the addition of Section 933(g)(2) on claimants who were not

receiving compensation benefits at the time of the third party settlement. The Dorsey Board held that this Section clearly applies regardless of whether the employer has made any compensation benefits to the claimant. Dorsey, supra at 29, 30. The Board continued:

> "It [Section 933(g)(2)] applies if no written approval is obtained pursuant to Section 933(g)(1) or if the employee fails to notify the employer of any settlement or judgment in a third party action."

Id.

The Board in Dorsey concluded that where a claimant is not a "person entitled to compensation" he is required to either obtain written approval or notify the employer of the third party settlement.

Id.

The Board further enunciated its

position in the recent case of Pinell, supra. In Pinell, the Board held that Section 933(g)(2) does not modify the written approval requirement of Section 933(g)(1), but rather, was intended to address an entirely different situation. Pinell, supra. The Pinell Board noted:

> "Thus, under subsection [9]33(g)(1), just as under the 1972 version of Section 933(g), claimant is barred from receiving further compensation under the Act if he is a 'person entitled to compensation', i.e. employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement. Under subsection [9]33(g)(2), regardless of whether employer has made payments or acknowledged entitlement, the employer must at a minimum be given notice of a settlement or compensation and medical benefits are barred; written approval is not required."

Id.

Petitioner was not a "person

entitled to compensation" under any of these interpretations. Thus, Petitioner was required only to notify Nicklos of the settlement agreement; written approval was not required. As Nicklos paid the settlement agreement, the Section 933(g)(2) notification requirement was met. Thus, Petitioner's right to future compensation benefits was preserved.

The Director's interpretation:

Petitioner recognizes that the Board's interpretation of Section 933(g)(2) is entitled to no special deference, since the Board does not "administer" the Act. Conversely, the Director, who is charged with the administration of the Act, is entitled to such deference. Boudreaux v. American

Workover, Inc., 680 F.2d 1034, 1046 & n. 23 (5th Cir. 1982) (en banc). Thus, unless the Director's interpretation is unreasonable or contrary to the purpose of the statute, the Director's construction of the Act should be accepted. Chemical Manufacturers Association v. NRDC, 470 U.S. 116, 125-126 (1985).

In this regard, the Court's attention is drawn to the Director's brief submitted before the Fifth Circuit in the captioned matter.

> "The Director's general construction of Section [9]33(g), insofar as here relevant, accords precisely with the Board's decisions on point. Under the administrative construction, also adhered to by the Board, the written-approval requirement of Section [9]33(g)(1) was inapplicable to Cowart because of Nicklos Drilling's refusal, as of the time of the tort settlement, to

> acknowledge his right to any compensation beyond the time (over a year before the settlement) when he was released to return to work; and he satisfied Section [9]33(g)(2), which was applicable to his case, by complying with one of its two alternative requirements, that of giving notice to the employer."
>
> Director's brief, p. 13.

The Fifth Circuit's interpretation, post-1984 amendments:

> In reversing the Board's affirmance of Petitioner's compensation award, the Fifth Circuit held:
>
> "... we hold that there are no exceptions whatever to the "unqualified" language of Section 933. Rather, "the employer shall be liable for compensation...only if written approval of the settlement is obtained from the employer and the employer's carrier..." 33 U.S.C. Section 933(g)(1). In this instance "only" means "only" and, absent any room for interpretation or construction, we give it its intended meaning."
>
> 907 F.2d 1552 (5th Cir. 1990).

Petitioner agrees with this holding. However, Petitioner must respectfully disagree with the Fifth Circuit's failure to follow the express "unqualified" language which it cites. Section 933(g)(1) provides that written approval is required when the claimant is a "person entitled to compensation." Petitioner is <u>not</u> a "person entitled to compensation" under the historical, judicial interpretation of that phrase. Thus, the "unqualified" language of Section 933(g)(1) does <u>not</u> apply to Petitioner.

> The Fifth Circuit continued:
>
> "Should Congress wish to give it another [interpretation], it need only say so."
>
> <u>Id.</u>

Petitioner respectfully submits that

Congress has already enunciated its intent to limit the written approval requirement of Section 933(g)(1) by enacting Section 933(g)(2) in 1984. The interpretation and construction indicated by this enactment has been discussed in detail supra, and need not be reiterated here. Suffice it to say, that under this Court's rules of statutory interpretation and construction set out in Colautti and Menasche, the Fifth Circuit's broad-brushed interpretation of Section 933(g)(2) is insupportable.

In reaching its decision, the Fifth Circuit relied exclusively on their decision in Petroleum Helicopters v. Collier, supra. The language in Collier is indeed strong.

"Section 933(g)(1) is brutally

direct: "the employer shall be liable for compensation...only if written approval of the settlement is obtained from the employer and the employer's carrier."

Collier at 647.

By adopting this language on its face value, without taking into consideration the factual situation to which it pertained, the Fifth Circuit, circumvented the clear intent of the 1984 legislative amendments to the Act discussed supra. A brief review of the facts in Collier, bears this assertion out.

In Collier, claimant, David Collier, was injured while working as a helicopter pilot for PHI. Collier at 645. Id. Collier thereafter applied for and received benefits from PHI's insurance carrier. Id. Collier subsequently sued

Conoco in Federal District Court. Id. Collier settled his claim against Conoco on April 17, 1979. Id. This settlement was confected without the approval of PHI or its carrier, and compensation benefits were terminated for that reason on April 17, 1979. Id.

David Collier was receiving compensation benefits from his employer/carrier at the time he settled with Conoco. Evaluating this situation under the O'Leary criteria, Collier was clearly a "person entitled to compensation", and thus was clearly under the purview of Section 933(g)(1). Examined in this light, Collier's harsh wording is correct. As to "persons entitled to compensation", Section 933(g)(1) is "brutally direct." David

Collier, as a "person entitled to compensation" was entitled to benefits only if written approval of the settlement was obtained from the employer and the employer's carrier.

By contrast, the Administrative Law Judge in the case at bar, determined that Petitioner was not receiving compensation benefits at the time of his settlement with Transco, and thus was not a "person entitled to compensation" under O'Leary and its progeny. Thus, Petitioner does not fall under the purview of Section 933(g)(1). Rather, Petitioner, as an "employee", but not a "person entitled to compensation", falls under the purview of Section 933(g)(2) and therefore need only notify the employer/carrier of his settlement with the third party. As

Nicklos not only knew of the proposed settlement agreement, but actually paid it, Section 933(g)(2)'s notification requirement was clearly met, and Petitioner's right to compensation benefits was not forfeited.

The Fifth Circuit's determination is clearly at odds with the Ninth Circuit's decisions in O'Leary, (discussed supra) and Bethlehem Steel Corp. v. Mobley, 920 F.2d 558 (9th Cir. 1990). While Bethlehem Steel concerned a claimant's right to medical benefits, the decision discussed the interpretation of Section 933(g)(2).

> "Section [9]33(g)(2)'s notification requirement thus serves two purposes. First, it enables an employer to protect its right to set off the amount of a settlement against any future obligations it might have. See 33 U.S.C. 933(f).

> Second, it ensures that an employer is able to protect its right to reimbursement from the proceeds of a third-party settlement in the amount of any payment the employer has already made. . . So long as the employer has notice of the settlement before it has made any payments and before the Agency orders it to make any payments, the purposes of the statute are satisfied.

Id. at 561.

The above emphasized language in the decision enunciates the same criteria upon which O'Leary and its progeny rely, indicating that O'Leary is still good law in the Ninth Circuit. Indeed, the Ninth Circuit held:

> "a claimant's notice to an employer of a third-party settlement before the employer has made any payments and before the Agency has announced any award is sufficient under section [9]33(g)(2).

Id. at 562.

In the captioned matter, Nicklos, by paying the settlement amount to

Petitioner, certainly had notice of said settlement. It is clear that had Petitioner's claim arose in the Ninth Circuit, under Mobley, the court would have reached a different result.

The effects of the Fifth Circuit decision:

By its erroneous reliance on Collier the Fifth Circuit's decision in the captioned case sounds the death knell for literally thousands of past, pending and future claimants. The foreseeable problems caused by the Fifth Circuit's decision can arise in three distinct manners.

As to past claims, the Fifth Circuit's decision will have the effect of subjecting all claimant's who have received compensation after third party

settlement pursuant to the O'Leary line of cases to claims for reimbursement from the employer's who paid these compensation benefits. As the Fifth Circuit's decision is clearly interpretive of existing law, rather than a substantive change in law, the decision will have retrospective effect.

Thousands of claimants have settled tort actions when their employer/carrier was denying their right to compensation. Relying on the administrative construction of Section 933(g), these claimants settled without concern that they were forfeiting their rights to deficiency compensation once the amount that would have been due under the Act exceeded the net amount recovered in settlement of their tort actions. These

claims have remained on inactive status pending the exhaustion of the tort recovery. Under the Fifth Circuit's decision, employers are now seeking dismissal of these claims. The number of claims thus affected is illustrated by the fact that one Sixth Compensation District employer, Ingalls Shipbuilding, has moved to dismiss over 3,000 pending claims, pursuant to the captioned decision. If this decision is allowed to stand, these claimants will be left with no source of support, other than that available through welfare and social security. The consequential burden on the taxpayers could be staggering.

As to pending claims, the administrative law judge in Wilson, supra enunciated the problem most clearly:

> "When the employer denies compensation liability and the claimant is disabled he is likely to have no income at all. He is under great pressure to settle his third party claim as quickly as possible, even for less than it is worth. The whole purpose of [Section 9]33(g) is to prevent inadequate settlements. If any settlement, even an inadequate one, simultaneously and automatically bars the claim to compensation, the employer is encouraged to defeat the purpose of [Section 9]33(g) by withholding its approval. Such a result is a dramatic injustice. Claimant has been forced to take less than he is entitled to by his employer, which profits from its own refusal to approve the settlement by being absolved of further compensation liability."

Wilson, supra at 478, 479.

This situation can be seen in more definite terms by examining the claimant's in O'Leary, supra and Kahny, supra. Both of these claimants were widows who settled tort actions under extreme financial pressure. Both

claimants diligently sought benefits under the Act throughout their contemporaneous pursuit of third party tort recovery. However, both claimants were unable to hold out until the employers' liability could be enforced in light of the delays of the administrative delays. Both claimants settled their tort claims due only to the financial duress that these delays imposed on them.

As to future claimant's, the injustice of the Fifth Circuit's decision is most clearly seen. As an example, the case of those claimants who have sustained an occupational disease is presented. These claimants have suffered injuries as diverse as grain dust asthma, pulmonary dysfunction, and asbestosis. These cases have many similar traits,

namely:

1. The claimants know that they have contracted the disease.

2. The claimants are not currently disabled.

3. The claimants are therefore not "persons entitled to compensation."

These claimants, as a class, are often still employed in longshore work due to the relatively slow progression of their respective diseases. Given the transient nature of longshore work, these claimants do not yet know which of their numerous future employers will be ultimately responsible for their compensation benefits. However, these claimants do know that they have contracted a disease that will undoubtedly lead to their future disability. They also know the identity of the third party responsible

for said disease.

The Fifth Circuit's decision places these claimants in an untenable position. According to this decision, these claimants cannot settle their third party claims without first securing the written approval of the employer who will ultimately be responsible for their compensation benefits. As these claimants have not yet suffered a manifest disability, thus entitling them to compensation under the Act, the identity of the employer ultimately liable for their compensation benefits is as yet unknown. Meanwhile, the prescriptive period on their third party claims is currently running. The only way these claimants can hope to settle their claims before such claims are

prescribed, is by hoping that somehow their disability manifests itself within the currently running prescriptive period. If, on the other hand, their disability does not manifest itself prior to prescription, these claimants will find their third party claims prescribed.

If Section 933(g) is given the interpretation suggested by the Fifth Circuit, that statute, as applied, clearly discriminates against these occupational disease claimants. While other claimants will still be afforded the opportunity to pursue both tort and compensation remedies simultaneously (as long as they are able to financially support themselves in light of a denial of benefits by the employer/carrier), the occupational disease claimants will be

forced to either pursue a current tort remedy and forego future compensation, or alternatively, forego a current tort remedy in exchange for pursuing future compensation. Surely, given the liberal nature of the Act, such a result cannot have been anticipated by the drafters of the 1984 amendments.

Indeed, the above result was the express result sought to be eradicated by the 1959 amendments to Section 933(g). Those amendment sought to correct the problems wrought by forcing claimants to choose between tort and compensation remedies. As the legislative history notes:

> "... in exercising his right to sue a third party for damages under section [9]33 of existing law, the employee must choose whether to collect the compensation to which he

> is entitled or to pursue the third-party suit. He may not pursue both courses.
>
> Existing law works a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning a third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit - those who, in effect, purchase an injured employee's claim for their own monetary advantage."
>
> 1959 Leg. Hist. p. 2134, 2135.

It is respectfully submitted that the captioned case will serve to place occupational disease claimants in the same predicament sought to be eradicated by the 1959 amendments.

CONCLUSION

This Court is now presented with a conflict between the decisions of the Ninth Circuit and this decision of the Fifth Circuit.

Because of the far reaching consequences of this decision, and the conflict existing within the Circuits, it is submitted that the United States Supreme Court should review this decision.

Respectfully submitted,

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APPENDIX A

NICKLOS DRILLING COMPANY and
Compass Insurance Company,
Petitioners

v.

Floyd COWART and Director, Office of
Workers' Compensation Programs, U.S.
Department of Labor, Respondents.

PETROLEUM HELICOPTERS, INC.
and American Home Assurance
Company, Petitioners

v.

Mary E. BARGER and Director, Office of
Workers' Compensation Programs,
United States Department of Labor,
Respondents

Nos. 89-4944, 90-1022

United States Court of Appeals
Fifth Circuit

March 29, 1991

Appeal was taken from decision of Benefits Review Board which affirmed award of Longshore and Harbor Workers' Compensation Act (LHWCA) benefits to injured employee. In second action, employer petitioned for review of

Benefits Review Board decision affirming award of LHWCA benefits to widow of employee killed in helicopter crash. The Court of Appeals, 907 F.2d 1552, 910 F.2d 276, vacated and remanded both cases. On further review of cases, consolidated on appeal, the Court of Appeals, en banc, held that LHWCA conditions eligibility for continuing benefits on employer's and employer's insurance carrier's prior written approval of any settlement between injured employee and third person for less than employee's LHWCA compensation settlement, regardless of whether employer or employer's insurer was paying LHWCA benefits at time of settlement.

Affirmed.

Politz, Circuit Judge, filed dissenting opinion in which King and Johnson, Circuit Judges, joined.

On Petition for Review of a Decision and Order of The Benefits Review Board, U.S. Department of Labor.

Before CLARK, Chief Judge, GEE*, POLITZ, KING, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER and BARKSDALE, Circuit Judges.

PER CURIAM:

Today we sit en banc to resolve a conflict in the law of our Circuit. In the cases consolidated on this appeal, two panels of our Court held that section 33 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. Section 933 (1988), conditions eligibility for continuing LHWCA benefits on the employer's and the employer's insurance carrier's prior written approval of any settlement between an injured employee and a third person for less than his

LHWCA compensation entitlement; and we further held that this approval requirement applies regardless of whether the employer or the employer's insurer was paying LHWCA benefits at the time of settlement. See also Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644,647 (5th Cir.1986). In an unpublished opinion, Kahny v. Director, Office of Workers' Compensation Programs, 729 F.2d 777 (5th Cir.1984), a panel of our Court held the contrary: that section 33's approval requirement applies only if the employer or its carrier is paying LHWCA benefits at the time of the settlement. Resolving this conflict, we now hold that the plain language of section 33 shows Congress' unambiguous intent to require prior approval whether or not the employer or its carrier was actually paying LHWCA benefits at the time of settlement. In the face of this manifest congressional intent, no administrative reinterpretation can be countenanced.

Background

In each case before us today, a person seeking LHWCA compensation for death or injury settled a related claim with a third person; and in each case, the settlement occurred at a time when the person was not receiving LHWCA benefits, was for less than the employee's compensation entitlement, and was consummated without the approval of the employer or his carrier. In Nicklos Drilling Co. v. Cowart, 907 F.2d 1552 (5th Cir.1990), Floyd Cowart, an employee of Nicklos Drilling Company, sought LHWCA compensation for injuries he had received on Nicklos' drilling rig. At a time when

Mr. Cowart was not receiving LHWCA benefits from Nicklos or its insurance carrier, he settled his claim against Transco Exploration Company, which owned the offshore platform that supported Nicklos' rig. In Petroleum Helicopters, Inc. v. Barger, 910 F.2d 276 (5th Cir.1990), Mary Barger, the widow of Walter Barger, sought LHWCA compensation for her husband's death. Mr. Barger died when the helicopter that he was piloting crashed. The helicopter was owned by his employer, Petroleum Helicopters, Inc. (PHI), and manufactured by Bell Helicopter Textron. Ms. Barger settled her claim against Bell at a time when she was not receiving LHWCA benefits from either PHI or its insurance carrier. The panel opinions contain more detailed accounts of the facts.

Review of an Administrative Interpretation

Generally, the question before us is whether section 33 of the LHWCA permits any exception to its requirement that all settlements with third persons that leave the employer liable for further compensation benefits have the prior written approval of the employer and the employer's insurance carrier. Specifically, the Office of Workers' Compensation Programs (OWCP) urges us to accept its in-house administrative interpretation that section 33 requires prior written approval only if the employer or its carrier is actually paying LHWCA benefits at the time of settlement. In Kahny we accepted OWCP's administrative interpretation, but in Collier, Nicklos Drilling, and Burger we rejected this

interpretation.

In support of its position, the OWCP points out that section 33's purpose is to allow a person entitled to LHWCA benefits to receive those benefits and still pursue civil remedies against third persons. According to the OWCP, the predecessor to section 33 required an election of remedies and often caused severe financial hardship to individuals who chose to pursue civil action and forego LHWCA benefits. OWCP argues that to alleviate this hardship Congress expressly eliminated election of remedies by enacting section 33 (a). Extending this argument, OWCP maintains that financial hardship can be avoided only by paying benefits during the pendency of a civil action; thus, settlements require prior written approval only if the employer or its carrier is actually paying benefits. The actual payment of benefits, according to OWCP, is the price which Congress intended employers to pay for the right of prior approval.

Second, OWCP maintains that section 33(g)(2) can be given complete meaning only if we accept OWCP's administrative interpretation. For convenience, we set out the relevant portions of section 33 here:

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employee is liable in damages, he need not elect whether to receive such compensation or

to recover damages against such third person.

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer nd the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative).

The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. Section 933(1988). OWCP argues that the language following the disjunctive "or" in section 33(g)(2)

would be rendered partially meaningless if prior written approval of all settlements were always required, because the alternative of merely notifying the employer of such a settlement would have no function.

We begin our consideration of OWCP's position by noting the Supreme Court's guidance in cases involving administrative interpretations.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed. 2d 694 (1984) (footnotes omitted).

More recent, and more closely in factual point, is the Court's decision in Demarest v. Manspeaker, --U.S.--, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991), where

the Court unanimously declined to give effect to a "longstanding administrative construction" in the face of clear statutory language granting witness fees to incarcerated state prisoners who testify in federal court proceedings.

The Court of Appeals, while agreeing that the statutory analysis outlined above was "(o)n its face...an appealing argument," 884 F.2d (1343) at 1345 (10th Cir.1989), relied on longstanding administrative construction of the statute denying attendance fees to prisoners, and two Court of Appeals decisions to the same effect, followed by congressional revision of the statute in 1984.

But administrative interpretation of a statute contrary to language as plain as we find her is not entitled to deference. See Public Employees Retirement System of Ohio v. Betts, 492 U.S.158 [109 S.Ct. 2854, 10 L.Ed.2d 134] (1989). There is no indication that Congress was aware of the administrative construction, or of the appellate decision at the time it revised the statute. Where the law is plain, subsequent re-enactment does not constitute an adoption of a previous administrative construction. Leary v. United States, 395 U.S. 6,24-25 [89 S.Ct. 1532, 1541-42, 23 L.Ed.2d 57] (1969).

When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.... We cannot say that the payment of witness fees to prisoners is sc bizarre that Congress "could not have intended" it. [Quoting Griffin v. Oceanic Contractors, Inc., 458 U.S.564,

575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982)].
--U.S. at --, 111 S.Ct. at 603-04 (footnote omitted).

As Collier, Nicklos Drilling, and Barger-our three most recent and only published opinions-demonstrate, we believe that the words of section 33 are unambiguous and therefore foreclose OWCP's contrary administrative interpretation. Yet, OWCP has raised two arguments that, if true, would introduce ambiguity concerning the congressional intent underlying section 33.

Turning to OWCP's first argument, we are unpersuaded that congressional desire to eliminate the financial hardship attendant on election of remedies necessitates an exception to section 33's approval requirement. First, the language of section 33 provides no exception to its approval requirement. Second, section 33(g)(2) does expressly provide that LHWCA benefits "shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter". 33 U.S.C. Section 933 (g)(2) (1988) (emphasis added). This language squarely refutes OWCP's contention that Congress intended the actual payment of benefits to be a tradeoff for the right of prior approval. Third, OWCP's reading of section 33 is not necessary to prevent financial hardship to persons pursuing civil remedies. Section 33(a) expressly provides that persons entitled to LHWCA benefits need not make an election of remedies; rather, they may receive the

LHWCA benefits while simultaneously pursuing the civil remedy. To the extent that LHWCA claimants may choose to ignore their rights and responsibilities under section 33, Congress did not and cannot have intended to guard against such self-inflicted hardship.

We are also unpersuaded that OWCP's administrative interpretation is necessary to give meaning to the phrase "or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person." 33 U.S.C. Section 933(g)(2)(1988). While superficially persuasive, OWCP's argument does not stand careful scrutiny. First, the quoted phrase is necessary because it extends the notification requirement to judgments. Second, the quoted phrase requires that the claimant notify the employer of _any_ settlement or judgment whatever. As we note above, prior written approval is required only if, as Section 33(g)(1) provides, the amount of the settlement is "less than the compensation to which the [claimant] would be entitled under this chapter." Congress intended to require prior written approval in the limited circumstance where a claimant settles for an amount smaller than his LHWCA compensation entitlement. By contrast, only notification is required when a claimant receives a judgment or settles for an amount exceeding his LHWCA compensation entitlement. Congress's schemes of approval and notification dovetail perfectly; there is no ambiguity.

Conclusion

After carefully considering the permissibility of OWCP's administrative interpretation in light of the plain language of section 33, we conclude that Congress has spoken unambiguously and so as to leave no room for such embroidery. We therefore hold, in accord with the clear terms of the statute, that section 33's prior written approval requirement applies regardless of whether the employer or its carrier is paying LHWCA benefits at the time of settlement. By Chevron, there it ends. Accordingly, we AFFIRM our decision in Nicklos Drilling, AFFIRM our decision in Barger, and OVERRULE our earlier, unpublished decision in Kahny. POLITZ, Circuit Judge, with whom KING and JOHNSON, Circuit Judges, join, dissenting.

I respectfully dissent. In 1984, as a member of an oral argument panel I authored the unpublished opinion in Kahny v. Arrow Contractors, 759 F.2d 777 (5th Cir.1984), (aff'd mem), in which we accepted the interpretation of the Director of the Office of Workers Compensation Programs, that the phrase "person entitled to compensation" as used in 33 U.S.C. Section 933(g) meant a person either receiving compensation benefits or the beneficiary of an ALJ award. I then considered such to be a proper interpretation of that statutory phrase; I am of the same opinion still.

The Director of the OWCP has so interpreted the phrase in an untold number of cases. In his briefs the Director has detailed the reasoning behind the interpretation, including the statutory

and legislative history of the parent legislation pertinent to the phrase. The Director advises that his conclusion is based not only upon that statutory and legislative history, but is informed by years of practical experience in administering the Longshore and Harbor Workers Act in many thousands of cases.

The majority rejects the Director's interpretation out of hand. I am not disposed to do so. Deference must be more than lip service. Deference presupposes deferring when one disagrees, otherwise there is no deference.

In this circuit we have recognized, both en banc and in panels, that the construction placed on the Act by the Director is to be given the deference we are constrained to give an administrative agency. See, e.g., Boudreaux v. American Workover, 680 F.2d 1034, 1046 n. 23 (5th Cir.1982) (en banc); Alford v. American Bridge, 642 F.2d 807, 809 n. 2 (5th Cir. 1981).

I view the Director's construction of the subject phrase to be a reasonable one, given the statutory and legislative history of the Act. Early on a person injured on the job had to elect either to proceed under the Act or to seek recovery in tort. Congress deemed this too harsh and eliminated the election requirement. In its place it placed the consent and, later, notice requirements in the Act. Both have a place in a comprehensive scheme which I perceive as just to all concerned. One need not elect but simultaneously may proceed in comp against the employer, while proceeding in tort against a responsible third party.

If one does the latter and is receiving comp benefits from the former one must secure the employer's consent to settle if one is to preserve the right to receive comp payments in excess of the tort settlement. That is totally appropriate and fair because the employer is entitled to a credit for the sums recovered in tort in the instance of a job-related injury caused by a tortiously acting third person. But the requirement is not absolute.

Assume a not infrequent occurrence. The employer denies owing compensation and refuses to pay. The employee seeks tort recovery from a third party. A settlement is offered. Why must the employee, who was denied comp, go hat in hand to the employer and request permission to settle his claim? Why should he? This query is not simply erecting a straw man. In one of the consolidated cases, Barger, we find the anomaly of the employer defensing a Jones Act claim by Barger's survivor by formally judicially claiming that it owed only LHWCA comp payments for Barger's accidental death, and then defensing the subsequent comp claim by insisting that the survivor had forfeited her comp claim because she did not get the employer's approval to settle the tort claim against a third-party tort feasor.

I agree with the Director's long-standing construction that it is not reasonable to require an employee to secure the approval of the employer before making a tort settlement if the employer has declined to pay comp benefits. I can conceive of no valid

purpose to be served by requiring otherwise other than to serve as the basis for forfeiture of a legitimate comp claim by an injured worker or the survivors of a deceased worker. The parties argue that the statute was amended to overrule the Director's erroneous interpretation. If that were so one would expect some small reference to such in the legislative history. There is none. There is no acceptable explanation offered for the absence of such.

In 1984 the provision containing the phrase at issue was reenacted without change. Surely that ought to be some indication that the universal construction given the phrase by the Director, multiple ALJs, the Benefits Review Board, and several courts has received congressional approval. I am so persuaded.

Finally, the provision for notice added in 1984, section 933(g)(2) adds to the force of the Director's construction. The Act first provides for approval of the employer if comp is being paid. In the notice provision the Act goes on to require notification of a settlement or judgment, whether comp is being paid or not. To me this latter is to alert the employer and comp carrier of the existence of an offset against any comp entitlement. It is a reasonable requirement to prevent double recovery. Nothing more.

I am convinced that the Director's interpretation in this instance is reasonable and I therefore respectfully dissent.

APPENDIX B

NICKLOS DRILLING COMPANY and
Compass Insurance Company
Petitioners

v.

Floyd COWART and Director, Office of
Workers' Compensation Programs, U.S.
Department of Labor, Respondents.

No. 89-4944
summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 9, 1990.

Injured worker sought additional Longshore and Harbor Workers' Compensation Act (LHWCA) benefits. The Benefits Review Board affirmed the administrative law judge's award in favor of the employee, and appeal was taken. The Court of Appeals held that future LHWCA benefits must be denied employee who fails to obtain prior consent by employer/carrier to settlement of his

claim against third-party tort-feasor.

Vacated and remanded.

Petition for Review of a Decision and Order of The Benefits Review Board, U.S. Department of Labor.

Before GEE, DAVIS, and JONES, Circuit Judges.

PER CURIAM:

Today we reverse a decision of the Benefits Review Board as contrary to the unambiguous language of the Longshore and Harbor Workers' Compensation Act (LHWCA) and to what we had thought was the clear mandate of this Court. Because the Benefits Review Board (BRB) has refused to heed Congress's and our earlier beyond peradventure. We have in the past consistently held, and we now reaffirm, that future LHWCA benefits must be denied an employee who fails to obtain prior consent by his employer/carrier to the settlement of his claim against a third party tortfeasor. There are no exceptions to this rule: Congress enacted none, we engraft none, and we will tolerate the engraftment of none by the BRB in cases within our appellate jurisdiction.

FACTS and PRIOR PROCEEDINGS

Floyd Cowart was injured on July 20, 1983, on a Nicklos Drilling Company drilling right. The right was on a fixed offshore platform being operated by Transco Exploration Company. Mr. Cowart made a claim against NIcklos and its carrier for benefits under the LHWCA and filed suit against TRansco in Federal District Court, seeking compensation for his injury. The carrier paid Cowart benefits for temporary total disability

until May 21, 1984, when he was released to return to work. On July 1, 1985, without the written approval of Nicklos or its carrier, Cowart settled his third party claim against Ransco for a lump sum payment of $45,000.00

Thereafter, Cowart filed this claim against Nicklos and its carrier seeking additional LHWCA compensation. Nicklos and the carrier resisted, arguing that Cowart's failure to obtain their written approval to the settlement barred his recovery of additional LHWCA benefits. a The ALJ ruled in favor of Cowart, awarding him the difference between the amount prescribed by the Act for permanent partial disability and the amount of the settlement. The Benefits Review Board affirmed. We reverse.

Discussion

The relevant section of the Longshore and Harbor Workers' Compensation Act provides as follows:

§ 933. Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

* * * * * * * *

(g) compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's

representative) enters into a settlement with a third person referred to in subsection (a) this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) this section only if written approval the settlement is obtained from employer and the employer's carrier before the settlement is executed, a by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer andy settlement obtained from or judgment rendered against a third person all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether employer or the employer's insurer made payments or acknowledged entitlement to benefits under this circuit.

33 U.S.C. § 933 (emphasis added).

The underlined portion of the above-quoted statute requires, in set terms and with qualification, exception or limitation, the person entitled to compensation obtain written approval both from his employer and from the employer's insurance carrier before entering into a settlement with a third person. A

failure to comply with this requirement results in the forfeiture of their benefits under the LHWCA, in all cases.

We have faced this issue in the past, and we are convinced that we resolved it properly. In Petroleum-Helicopters, Inc. v. Collier we made clear that § 933's requirement that an employee and carrier for any settlement with a third party tortfeasor is "unqualified", and we declined to read into it a "waiver of subrogation" exception. Petroleum Helicopters, Inc. v. Collier, 784, F.2d 644, 647 (5th Cir. 1986).

so that the BRB can be guided in its future decisions, and because we do not wish to again revisit the issue, we hold that there are no exceptions whatever to the "unqualified" language of § 933. Rather, "the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier ..." 33 U.S.C. § 933(g)(1) (emphasis added). In this instance "only" means "only" and, absent any room for interpretation or construction, we give it its intended meaning. Should Congress wish to give it another, it need only say so.

According, the Decision and Order of the Benefits Review Board is VACATED and this matter is REMANDED to the Administrative Law Judge for the entry of an order consistent with this opinion.

APPENDIX C

BRB No. 87-330

FLOYD COWART Claimant-Respondent	)
v.	)
NICKLOS DRILLING COMPANY	)
and	)
COMPASS INSURANCE COMPANY Employer/Carrier Petitioners	)

DECISION AND ORDER

Appeal of the Decision and Order, the Order on Petition for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of Parlen L. McKenna, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Seelig, Cosse, Frischhertz and Poulliard), New Orleans, Louisiana, for Claimant.

H. Lee Lewis, Jr. (Ross, Griggs & Harrison), Houston, Texas, for employer/carrier

Before: SMITH, Acting Chief Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and

Order, the Order on Petition for Reconsideration and the Supplemental Decision and Order Awarding Attorney's Fees (85-LHC-2125) of Administrative Law Judge Parlen L. McKenna rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Section 901, et seq., as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. Section 1331, et seq., (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are supported by substantial evidence, are rational and are in accordance with law. 33 U.S.C. Section 921(b)(3); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant was injured in the course of his employment on July 20, 1983, while working on a fixed platform operated by Transco Exploration Company. Claimant suffered injuries to his right hand and lost the distal half of his right thumb as a result of this incident. Claimant was off work from July 21, 1983 to May 21, 1984, when he was released to return to work with employer with a 40 percent permanent partial disability based on the loss of use of his right hand and thumb. Employer paid claimant temporary total disability benefits during this period. 33 U.S.C. Section 908(b). However it refused to pay claimant permanent partial disability benefits upon his return to work. Claimant filed a civil suit in the United States District Court for the Eastern District of Louisiana, alleging that Transco, the third party and owner

of the platform, was responsible for his injuries. Prior to trial, a settlement was reached between Transco and claimant on July 1, 1985 in which Transco agreed to pay claimant a lump sum of $45,000. Employer did not give its written approval of this settlement, but it did have notice of the settlement. Claimant subsequently filed this claim under the Act for a schedule award of permanent partial disability benefits based on the injuries to his right hand and thumb. Employer contended below that because it did not give written approval to claimant prior to the third party settlement, claimant is barred under Section 33(g), 33 U.S.C. Section 933(g), from receiving any future compensation.

The administrative law judge found that Section 33(g) did not bar claimant's right to compensation under the Act. The administrative law judge noted that in Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir.1986), rev'g 17 BRBS (1985), the United States Court of Appeals for the Fifth Circuit held that the failure by an injured employee to obtain employer's prior consent to settlement of the employee's claim against a third party tortfeasor bars the employee's right to future benefits under the Act, including situations where the employer has contractually waived its subrogation rights against the third party tortfeasor. The administrative law judge stated, however, that the court in Collier made no decision regarding what would occur where benefits were not being voluntarily paid by employer at the time of settlement,

i.e., where one is not a "person entitled to compensation" under the Act. The administrative law judge noted that in O'Leary v. Southeast Stevedoring Co., 18 BRBS 25 (1986), the Board indicated that it is only in situations where employer is paying compensation either voluntarily or pursuant to an award that claimant is are required to obtain prior written consent for its third party settlement. The administrative law judge concluded that since in the instant case claimant was not receiving compensation from employer at the time of settlement he was not a person entitled to compensation under Section 33(g)(1) of the amended Act and that employer's prior written approval was not required. 33 U.S.C. 933(g)(1)(Supp. V 1987). The administrative law judge further found that Section 33(g)(2), 33 U.S.C. Section 933(g)(2) (Supp.V 1987) did not bar the claim, as employer had notice of the settlement before it was effected. The administrative law judge therefore ordered employer to pay claimant permanent partial disability benefits of $6,242.17, or the difference between the amount of his past due compensation, $35,592.77, and his net recovery from the third party settlement, $29,350.60. 33 U.S.C. Section 907, ordered employer to pay claimant interest in accordance with 28 U.S.C. Section 1961 on all past due benefits, and authorized claimant's counsel to submit a petition for an attorney's fee.

Following the issuance of the administrative law judge's Decision and Order, employer submitted a Motion for

Recusal and Petition for Reconsideration of the administrative law judge's Decision and Order. (1) Regarding the petition for reconsideration, the administrative law judge reiterated his finding in his original Decision and Order, i.e., that since claimant was not a "person entitled to compensation", Section 33(g)(1) does not bar his right to compensation under the Act. Moreover, the administrative law judge rejected employer's contention that he raised the issue of claimant's entitlement to future medical benefits sua sponte, thus causing prejudice to employer and violating its procedural due process rights, concluding that he had properly addressed the issue of future medical benefits. Lastly, the administrative law judge reaffirmed his findings granting interest and claimant's entitlement to an attorney's fee award. Claimant's counsel subsequently was awarded an attorney's fee of $4,125.74.

On appeal, employer contests the administrative law judge's findings with regard to Section 33(g), medical benefits, interest, and attorney's fees. Claimant responds, urging affirmance.

I. Section 33(g)

Employer contends that the administrative law judge's finding that Section 33(g) does not bar claimant's right to future compensation runs contrary to the Fifth Circuit's holding in Collier, supra. Employer challenges the administrative law judge's reliance on the fact that claimant was not a "person entitled to compensation", i.e., receiving voluntary payments at the time of

settlement. Employer ccntends that the Fifth Circuit in Collier imposed an absolute requirement for written approval of third party settlements, and did not mention anything pertaining to a "person entitled to compensation". Employer further asserts that Collier involved a situation, like that in the instant case, where the two employers had a contract containing an agreement to waive subrogation and to indemnify the potential third party tortfeasor. Finally, employer contends, the Fifth Circuit in Collier reviewed the changes made by the 1984 Amendments to Section 33(g) and concluded that the Act allows no exceptions to the written approval requirement.

We reject employer's contentions, as we agree with the administrative law judge that Collier may be distinguished from the instant case. In Collier, the claimant was receiving voluntary payments of compensation from the employer for injuries sustained in a work-related accident. Claimant sued a third party tortfeasor in Federal District Court, but settled this suit without the approval of the employer or its carrier. The employer subsequently terminated its compensation payments. Claimant sought to have his disability benefits resumed, and the employer countered that claimant's failure to obtain its consent to the settlement eliminated its compensation liability. The administrative law judge rejected this contention, and the Board affirmed, agreeing with claimant that the employer's approval of the settlement was unnecessary as the employer had contractually waived all rights of subro-

gation against the third party. The Board also stated that Section 33(g) does not apply in cases where the employer waives its subrogation rights against a third party. Collier v. Petroleum Helicopters, Inc., 17 BRBS 80 (1985).

The employer appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit, which reversed the Board's decision. Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1936). The court framed the narrow issue before it as follows:

(D)oes the failure of an injured employee to obtain the prior consent of the employer/carrier to settlement of the employee's claim against a third party tortfeasor bar the employee's right to future benefits under the LHWCA when the employer/carrier has contractually waived their subrogation rights against the third party tortfeasor?

Collier, 784 F.2d at 645, 18 BRBS at 68 (CRT). The court held that although one of the employer's interests in the settlement, that of recoupment of compensation benefits from the settlement proceeds, was absent under these circumstances, the employer retained an interest in the amount of its statutory offset under Section 33(f), 33 U.S.C. Section 933(f); therefore, claimant's failure to obtain the employer's prior written consent under Section 33(g) barred claimant's right to further compensation. Id., 784 F.2d at 646-647, 18 BRBS at 71 (CRT). See also Pinell v. Patterson Service, 22 BRBS 61 (1989).

As the administrative law judge

found, the instant case is not factually similar to Collier, and the legal issues are not the same. Although, as in Collier, employer and Transco had a waiver of subrogation agreement in this case, no one contends that fact renders Section 33(g) inapplicable. As the subrogation agreement, and that issue is not present here. Moreover, in Collier, employer voluntarily paid benefits at the time of the third party settlement. Thus, there was no dispute that Section 33(g) in 1984 with the addition of Section 33(g)(1) applied unless the waiver of subrogation agreement rendered it inapplicable. The changes made in Section 33(g) in 1984 with the addition of Section 33(g)(2) and their effects on claimants who were not paid benefits voluntarily or pursuant to an award were not before the court. (2)

Prior to the 1984 Amendments, the Board held that a claimant was a "person entitled to compensation" within the meaning of Section 33(g), 33 U.S.C. Section 933(g)(1982) (amended 1984), if employer was paying benefits either voluntarily or pursuant to an award at the time of the third party settlement. See O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980). If claimant was not receiving benefits, Section 33(g) did not apply. See Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982), aff'd mem., 729 F.2d 777 (5th Cir. 1984). At that time, Congress added Section 33(g)(2), which provides:

> (2) If no written approval of the settlement is obtained and filed as

> required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

33 U.S.C. Section 933 (g)(2)(Supp. V 1987). In Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986), the Board addressed the effect of the addition of Section 33(g)(2) on claimants who were not receiving any benefits at the time of a third party settlement. This section clearly applies regardless of whether employer has made any payments to claimant. However, it applies if no written approval is obtained as discussed in subsection (g)(1) or if the employee fails to notify the employer of any settlement or judgment in a third party action. In Dorsey, in order to give effect to all parts of the statute, the Board concluded that where claimant is not a "person entitled to compensation," he is required to either obtain written approval or notify employer of the third party settlement. See also Chavez v. Todd Shipyards Corp., 21 BRBS 272 (1988); Mobley v. Bethlehem Steel Corp., 20 BRBS 239 (1988). This construction of the statute protects employer's Section 33(f) lien interest by requiring that claimant, at a minimum, provide employer with notice of any settlement or judgment. See Mobley, supra.

As employer contends, the court's opinion in Collier contains language to the effect that there is no exception to the written approval requirement of Section 33(g)(1). The court in Collier, however, did not address the case where claimant is not a "person entitled to compensation" or the notice provision of Section 33(g)(2). Under these circumstances, the administrative law judge found that employer had notice of the settlement at least three months before it was consummated. Accordingly, as the administrative law judge's finding that Section 33(g) does not bar claimant's entitlement to benefits is rational, supported by substantial evidence and is in accordance with law, we affirm his finding.

II. Interest

Employer contends that the administrative law judge's award of interest on past due compensation payments runs contrary to 28 U.S.C. Section 1961, which it claims only allows interest to be paid on money judgments in civil cases in District Court. We reject this contention. While there is no provision in the Act providing for payment of interest on unpaid installments of compensation, the Board has held that interest awards are consistent with the congressional purpose of making claimants whole for their injuries. Santos v. General Dynamics Corp., 22 BRBS 226 (1989); Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984), modified on reconsideration, 17 BRBS 20 (1985). The Board relied on Section 1961 in Grant as guidance in

establishing an appropriate rate of interest. We therefore reject employer's contention that Section 1961 is not applicable to administrative tribunals, and we affirm the administrative law judge's award of interest on past due compensation.

III. Medical Benefits

Employer contends that the administrative law judge's award of future medical benefits was not based on the evidence contained in the record, and was raised sua sponte by the administrative law judge. Employer contends that it had insufficient opportunity to respond to the administrative law judge's order of May 14, 1986, in which he found that the issue of future medical benefits should be included for consideration in the instant case, and that claimant submitted his brief without providing a copy of a certificate of service to employer.

We reject employer's argument. As the administrative law judge noted in his order on Petition for Reconsideration, he is permitted pursuant to 20 C.F.R. Section 702.336(a) (3) to include new evidence or issues not raised in the parties' pleadings, provided the parties are provided with fair notice. See Cornell University v. Velez, 856 F.2d 402, 21 BRBS 155 (CRT) (1st Cir. 1988). The administrative law judge noted in his Order on Petition for Reconsideration that claimant had initially raised the issue of his entitlement to future medical benefits at the hearing and had expressed his concern that such benefits might not be forthcoming. The

administrative law judge then issued an order in which he stated that although no discussion regarding the issue of future medical benefits was held at the hearing, and was not raised in the pleadings, he would consider the issue in view of claimant's "strong feelings" on the subject. (4) Order at 3-4. The administrative law judge then directed the parties to submit briefs addressing this issue within 30 days, and gave employer ten days to submit additional evidence in opposition to the grant of future medical benefits and to indicate whether it wanted an additional oral evidentiary hearing regarding the matter. As employer had an opportunity to address the issues, availed itself of this opportunity and submitted a brief, its due process rights were not violated.

Further, and administrative law judge can award future medical benefits for a work-related injury, but the services ultimately provided must be reasonable and necessary for the work-related injury. 33 U.S.C. Section 907; see generally Winston v. Ingalls Shipbuilding Inc., 16 BRBS 1007, rev'd on other grounds, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1982). At such time when claimant applies for future medical expenses, employer may object to such treatment as the issue arises. We therefore affirm the administrative law judge's award of future medical benefits.

IV. Attorney's Fee

Employer lastly contends that the administrative law judge erred in awarding claimant's counsel an attorney's

fee because it did not receive a copy of the fee petition. Employer also raises specific objections to itemizations in the fee petition. The administrative law judge awarded claimant's counsel an attorney's fee of $4,125.74 in his Supplemental Decision and Order Awarding Attorney's Fees. Employer objected to this award, however, alleging that it never received a copy of claimant's fee petition and was therefore unable to contest the award. The administrative law judge thereafter issued an Order Staying Attorney's Fees, in which he allowed employer an opportunity to review claimant's fee petition and to make objections. However, the administrative law judge has not issued his final decision on the award of an attorney's fee and employer raises specific objections to the award before the Board.

Accordingly, the Decision and Order and the Order on Petition for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

Dated this 31st
day of October 1989

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(1) The administrative law judge denied employer's motion for recusal finding that it was without merit. Employer does not contest the administrative law judge's denial of its motion.

(2) The amended version of Section 33(g) applies to this case as it was filed after or pending on September 28, 1984, the effective date of the Longshore and Harbor Workers' Compensation Act Amendments of 1984. 1984 Amendments,

Pub. L. No. 98-426, 98 Stat. 1639, 1655, Section 28(a).

(3) Section 702.336(a), 20 C.F.R. Section 702.336(a) states:

If, during the course of the formal hearing the evidence presented warrants consideration of an issue or issues not previously considered the hearing may be expanded to include the new issue. If in the opinion of the administrative law judge the new issue requires additional time for preparation, the parties shall be given a reasonable time within which to prepare for it.

(4) The administrative law judge also noted that a conference call was held in which he informed the parties that he would subsequently issue and order regarding the matter.

APPENDIX D

In the Matter of

FLOYD COWART, Claimant	)	Case No. 85-LHC-2125
versus	)	OWCP No. 8-77392
NICKLOS DRILLING COMPANY, Employer	)	
COMPASS INSURANCE COMPANY, Carrier	)	

Doulgas M. Moragas,
Esquire For the Claimant

H. Lee Lewis, Jr.,
Esquire For the Employer/Carrier

Before: PARLEN L. McKENNA
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. (The Act), and the governing regulations thereunder, as extended to cover certain employees under the Outer

Continental Shelf Lands Act, 675 Stat. 462, 43 U.S.C. 1331 et seq. The claim was filed by Floyd Cowart, Claimant, against Nicklos Drilling Company, Employer, and Compass Insurance Company, Carrier. On July 18, 1985, this matter was referred for a formal hearing to the Office of Administrative Law Judges. The hearing was held in New Orleans, Louisiana, on April 29, 1986. Claimant's exhibits numbered 1 through 6 and Joint exhibit number 1 were admitted into evidence without objection.

During the hearing in this matter, questions were raised as to whether the Fifth Circuit's decision in Petroleum Helicopter, Inc., et al v. Collier, No. 85-4321 (March 10, 1986), barred the Claimant's cause of action under Section 33(g) of the Act. The Employer's counsel took the position that since the Claimant had settled his third-party suit without the written consent of the Employer, a claim for compensation benefits is barred under the Longshore Harbor Workers' Compensation Act.

33 U.S.C. 901 et seq. Claimant's counsel indicated that absent a bar because of the third-party settlement, Mr. Cowart would have been entitled to $35,392.77 as a scheduled injury. Mr. Cowart's gross third party recover while amounting to $45,000.00 only netted him $29,350.60, after the deduction of attorney's fees and expenses. Thus, absent a bar, Mr. Cowart would have been entitled to $6,242.17 plus future medical benefits if he prevailed in this case. Since neither party had anything further to present, the hearing was adjourned.

Issues

On May 14, 1986, the undersigned issued an Order directing the parties to submit briefs addressing the following issues within 30 days from the date of issuance of the Order:

(1) Whether the Claimant waived his right to permanent partial disability benefits under Section 8(c)(6) of the Act and to future medical benefits by settling a related third-party lawsuit without his employer's written consent; and

(2) Whether the Fifth Circuit's decision in Petroleum Helicopter, Inc., et al v. Collier, No. 85-4321 (March 10, 1986), overruled the Benefit Review Board's decisions in Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986), and O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem., 611 F.2d 595 (9th Cir. 1980).

Consequently, these unresolved issues will be addressed in this Decision and Order.

Stipulations

At the outset of the hearing, the parties stipulated, and I so find:

1. That the parties are subject to the Act;

2. That Claimant and Employer were in an employee/employer relationship at the time of the injury;

3. That Claimant was injured on July 20, 1983.

4. That Claimant was in the course and scope of his employment;

5. That Claimant gave timely notice of the injury to Employer;

6. That Claimant filed a timely

claim for compensation;

7. That Employer filed a timely notice of controversion of the claim;

8. That compensation benefits were paid to Claimant for temporary total disability from July 21, 1983 to May 30, 1984, at a rate of $364.68 per week for a total of $16,775.28 to date of hearing;

9. That Claimant's average weekly wage was $547.00;

10. That Claimant is now permanently partially disabled (40% to his hand);

11. That all medical benefits have been paid; and,

12. That at the time of the injury there was in effect a Platform Drilling Contract which provided for an agreement to hold harmless, waiver of subrogation and indemnification between the parties and those provisions were adhered to by the parties.

Facts

Claimant, a motorman, was employed by Nicklos Drilling Company, and at the time of the accident, was working on a fixed platform owned and Transco Exploration Company (Transco). On July 20, 1983, Claimant was laboring on Rig #81, located on the Outer Continental Shelf, when he sustained injuries to his right hand, when a mud tank crushed his hand during movement of the tank by a crane. Claimant also lost the distal half of his thumb as a result of the accident. Following his injury, Claimant was treated by a series of physicians, including Frank X. Cline, Jr., M.D., an orthopaedic surgeon of Monroe, Louisiana. Claimant reached maximum medical improvement on May 21, 1984. At that

time, Dr. Cline released Claimant to return to employment and assessed a 40% permanent partial disability based on the loss of the distal half of his thumb and residual synovitis in the flexor tendons.

Employer and its Carrier paid Claimant temporary total disability from July 21, 1983 through May 21, 1984, at the rate of $346.68 per week for a total of $16,775.28. Since Claimant had a scheduled injury under Section 8(c)(6) of the Act, once he reached maximum medical improvement he was automatically entitled to 66 2/3 of his average weekly wage of $542.00 for a period of 75 weeks commencing May 22, 1984. The Department of Labor recommended Employer/Carrier to pay Claimant compensation based on his permanent partial disability rating. The record indicates that Employer/Carrier never made such payments. Finally, on April 22, 1985, the Deputy Commissioner corresponded to the Carrier noting that compensation in the amount of $35,592.77 plus 10% penalties and interest was due to the Claimant. Claimant filed suit in the United States District Court for the Eastern District of the Louisiana against Transco, the third party and owner of the rig, for its negligence in causing the accident. On July 1, 1985, Claimant confected a settlement with Transco for $45,000.00 of which he netted $29,350.60 after the deduction of attorney's fees and expenses. Employer/Carrier did not give written approval of the settlement but had notice of the settlement, as is indicated by the record.

The findings of fact and conclusions of law which follow are prepared upon my

analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law.

Findings of Fact and Conclusions of Law

The threshold question to be resolved is whether Section 33(g) bars the Claimant's entitlement to (1) permanent partial disability and (2) future medical benefits. Fundamental to the first question is whether the Fifth Circuit's decision in Collier, supra, overruled the Benefits Review Board decision in the Dorsey and O'Leary, supra. Claimant argues that Section 33(g) does not bar his recovery to compensation and future medical benefits pursuant to the Board's decisions in Dorsey and O'Leary, supra. Claimant argues that he is only required to obtain written approval from the Employer if he is receiving compensation. Since he was entitled to receive compensation for his scheduled injury after reaching maximum medical improvement, but the Employer withheld such compensation, he had no obligation to give written notice of the settlement to the Employer, relying on Dorsey's Section 33(g)(2) exception to the written notice requirement. (Also, see O'Leary, supra).

On the other hand, the Employer/Carrier contend that since Claimant did not secure written approval of the third party settlement pursuant to Section 33(g) of the Act, he is barred from entitlement to $6,242.17, the difference between his net recovery and the outstanding compensation still due and from a right to future medical benefits. Relying on Collier, supra, the

Employer/Carrier contend that both Sections 33(g)(1) and 33(g)(2) mandate that written approval be secured from the Employer. The Employer/Carrier further contend that there is no exception to the written approval requirement as suggested in Dorsey, supra.

If I find that the Employer/Carrier position is correct, then the Claimant is barred from recovering compensation and future medical benefits. Accordingly, a determination, must be made regarding whether the Fifth Circuit in Collier intended to overrule the Board's decision in Dorsey.

In Collier, the Fifth Circuit began the opinion by noting that the question they had to answer was a narrow one: "does the failure by an injured employee to obtain the prior consent of the employer/carrier to settlement of the employee's claim against a third party tortfeasor bar the employee's right to future benefits under LHWCA when the employer/carrier has contractually waived their subrogation rights against the third party tortfeasor." After careful examination of Section 33(g), the Fifth Circuit held, in pertinent part:

> There is nothing in the language of Section 933 to support a 'waiver of subrogation' exception to the unqualified requirement that an employee obtain the consent of the employer and carrier for any settlement with a third party tortfeasor. To the contrary, Section 933(g)(1) is brutally direct: 'the employer shall be

> liable for compensation. . . only if written approval of the settlement is obtained from the employer and the employer's carrier' (emphasis added).

Thus, the Fifth Circuit held in Collier that where an employee is a "person entitled to compensation" under the Act, nothing in Section 33(g) supports a "waiver of subrogation" exception to the unqualified requirement that an employee obtain written consent for settlement with a third party tortfeasor. The underlying public policy rationale for that position is:

> to ensure that employer's rights are protected in a third party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. 933(b)-(f). Collier v. Petroleum Helicopters, Inc., 17 BRBS 80, 82 (1985). See also Dorsey, supra, at 27, 28.

However, the Collier decision did not rule on the issue of where benefits are not being paid, and the claimant is not a "person entitled to compensation" under the Act. Indeed, the O'Leary court, which was affirmed by the Ninth Circuit of Appeals, specially addressed and inequity of applying the presumption in a case such as the one at bar:3

The Act is clearly written with the underlying concept that the employer upon being informed of an injury will voluntarily begin to pay compensation. See 33 U.S.C. Section 914(a). The

provisions of Section 33 similarly contemplate either payments being made voluntarily or pursuant to an actual award. Section 33(g) which requires the consent of the employer to the third party settlement refers to Section 33(f) which indicates that in cases of third party settlement, the employer's liability to the claimant is for those sums in excess of that gained in the third party settlement, the very language contemplating that employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination. Moreover, Section 33(b) provides:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

This provision clearly implies an employer's rights under Section 33 derive solely from their making either voluntary payments under the Act or pursuant to an award.

Only where an employer voluntarily pays compensation or where an award is entered against the employer does it make sense to require written consent by employer to the third party settlement. To find otherwise could severely prejudice a claimant's rights.

Several reasons support this

interpretation. First, the legislative history of the 1984 Amendments indicates no congressional intent to overrule O'Leary. The 1984 Amendments did not alter the language in the 1972 Act now found in subsection (g)(1), which states that this provision only applies to a "person entitled to compensation." Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt the interpretation when it re-enacts a statute without change. Lorillard v. Pons, 434 U.S. 574, 580-81 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 N.8 (1975); NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951).

Second, this interpretation gives meaningful effect to the phrase "or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person" contained in subsection 33(g)(2). In construing a statute, a judicial body is obliged to give effect, if possible, to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); U. S. v. Menasche, 348 U.S. 528, 538-39 (1955). A basic rule of construction is that a statute should be interpreted so as not to render one part inoperative. Colautti v. Franklin, 439 U.S. 379, 393 (1979). If subsection (g)(2) were interpreted to require written notice regardless of whether claimant was receiving compensation at the time of the third party settlement, as employer argues, the phrase requiring notice of any settlement of judgment would be rendered superfluous since the written

approval requirement makes any additional notification unnecessary. See Colautti, supra. Under this analysis, however, claimant must give notice to employer if he is not receiving compensation. Consequently, notice along is sufficient where the claimant is not "entitled to compensation" under subsection 33(g)(1).

Finally, this conclusion that claimant need obtain written approval of a third party settlement only when he is "entitled to compensation" is consistent with policy concerns. The Act should be construed in order to further its purpose of compensating longshoremen and harbor workers "and in a way which avoid harsh and incongruous results." Voris v. Eikel, 346 U.S. 328, 333 (1953); Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 268 (1977). If Section 33(g) was applied as employer argues, the result would be harsh and unfair. There would be no means to protect claimant against the withholding of consent by employer or its insurer in a meritorious case. In any case in which a settlement was entered into for an amount less than the compensation to which claimant would be entitled under the Act, employer would only need to withhold its written approval of the settlement thereby avoiding the payment of compensation under the Act. The purpose of Section 33(g) can be satisfied by the less restrictive approach adopted in this opinion. See Devine v. National Creative Growth, Inc., 16 BRBS 147, 154 (1982) (Opinion of Ramsey, C.J., dissenting).

Indeed, if a claimant was injured

through the negligence of a third party and the employer denied coverage under the Act, a claimant would be forced to sue the third party. However, even if the claimant obtained a reasonable settlement offer, an employer could refuse to give its consent to the third party settlement for any number of reasons, e.g., it does not wish to approve the settlement on a form provided under the Act since its consent to jurisdiction under the Act might be inferred. This could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money (the Act providing no procedure for waiving employer's consent unlike some state acts). Surely, Congress by requiring written consent could not have contemplated such a result. O'Leary, supra, at 147-149.

The Board's interpretation in Dorsey of the amended Section 33(g) follows:

> Employer contends that the phrase 'regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act,' inserted at the end of subsection 33(g)(2), overrules O'Leary4 and that compensation is therefore barred in this case regardless of the timing of the settlement. We reject this contention. We do not view this new

phrase in subsection 33(g)(2) as modifying the written approval requirement of subsection 33(g)(1). Rather, we view subsections 33(g)(1) and 33(g)(2) of the amended Act as separate provisions applicable to separate situations.

Under subsection 33(g)(1), the employer's written approval of a settlement must be obtained where employer is paying compensation as stated in O'Leary. Under subsection 33(g)(2), regardless of whether employer has made payments or acknowledged entitlement (i.e., where O'Leary does not apply), the employer must at a minimum be given notice of a settlement; written approval is not required. Thus, the statute as interpreted in O'Leary is re-enacted in subsection 33(g)(1), and an additional notice requirement in cases where the claimant is not 'entitled to compensation' under subsection 33(g)(1) is enacted in subsection 33(g)(2).

In this case, it is clear that at the time of the settlement with Transco, Claimant was not receiving compensation. Therefore, Claimant was not a "person entitled to compensation" under 33(g)(1) (emphasis added). Accordingly, the provisions of 33(g)(2) are applicable to the facts of this case. Under subsection 33(g)(2), the employer/carrier must be given notice of the settlement; written approval is not required. The record indicates that the Employer/Carrier had notice of the settlement at least 3 months before it was confected. The fact

that Employer/Carrier's written approval was not obtained is therefore irrelevant.

Based upon the foregoing findings of fact, conclusions of law, and the entire record, I make the following compensation Order. The specific dollar computations of the compensation award shall be administratively performed by the Deputy Commissioner. Interest as hereinafter provided in the Order is applicable to all past due weekly installments of compensation.

ORDER

Therefore, it is the ORDER of the Administrative Law Judge that:

1. Employer/Carrier shall pay the Claimant $6,242.17, the difference between the amount of his past due compensation ($35,592.77) and his net recovery from the third party settlement ($29,350.60).

2. Employer/Carrier shall pay for all future medical benefits related to the Claimant's July 20, 1983 injury.

3. Employer/Carrier shall pay to the Claimant interest in accordance with 28 U.S.C. 1961 on all past due benefits outstanding.

4. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel who shall then have 10 days to respond with objections thereto.

Dated: November 25, 1986

New Orleans, Louisiana

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1. Under these provisions, employer is entitled to credit the proceeds of a third party settlement or judgment in a suit brought by claimant or employer, against employer's liability for

compensation under the Act.

2. While the Collier decision contained language which could be construed as supporting the Employer's position, such dicta is not controlling. Moreover, there was no discussion of either the Dorsey or O'Leary cases by the Fifth Circuit in Collier. Thus, it does not follow that the Court would expand its holding in Collier to cover the facts presented here. Under this circumstance, I am constrained to follow and fully support the Dorsey rationale.

3. The fact that Section 33(g) was subsequently amended has no affect on the legal or public policy analysis herein.

4. In O'Leary, the Board interpreted the language "person entitled to compensation" as indicating that Section 33(g) bars compensation only when employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement. See also Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982) (Ramsey, C.J., concurring in result), aff'd mem, 729 F.2d 757 (5th Cir. 1984); Caranate v. International Terminal Operating Co., 7 BRBS 248 (1977).

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 83-4104

EDNA KAHNY, (Widow of Don Kahny)
Petitioner,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and ARROW CONTRACTORS OF JEFFERSON, INC. and LIBERTY MUTUAL INSURANCE COMPANY,
Respondents.

No. 83-4109

ARROW CONTRACTORS OF JEFFERSON, INC. and LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and EDNA KAHNY, Respondents.

Petitions for Review of an Order of the Benefits Review Board

Before POLITZ, RANDALL and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

These consolidated petitions, brought pursuant to § 21(c) of the Lonshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 921 (c), seek review of the final order of the Benefits Review Board (BRB), affirming the compensation award by an administrative law judge, in Kahny v. Arrow Contractors, Inc., 15 BRBS 212 (1982). Edna Kahny petitions for review, as does Arrow Contractors of Jefferson, Inc. and its compensation insurer, Liberty Mutual Insurance Company. We modify the award and affirm.

FACTS

Don Kahny was accidentally killed on February 22, 1979, while working for Arrow on a fixed platform on the outer continental shelf off the coast of Louisiana. Shortly thereafter, Edna Kahny, Don Kahny's widow, filed a claim for compensation benefits under the LHWCA, as extended by the Outer continental Shelf Lands Act, 43 U.S. C. § 1333(b). At the same time, she filed a tort action against the owner of the platform and the owners of the drilling rig. Arrow controverted Edna Kahny's right to receive death benefits, contending that she id not qualify as a "widow" under § 9(b) of the LHWCA, 33 U.S.C. § 909(b). After some delay, Liberty Mutual paid Edna Kahny $1,500, in reimbursement of a portion of the funeral

expenses she had incurred.

After approximately ten months, ill, unable to work, an in dire financial straits because of the loss of her husband's income, Edna Kahny authorized her attorneys to settle her tort claim for $125,000. her net recovery, after deduction of attorney's fees, was $83,333.34. Because of her financial difficulties, Edna Kahny's attorney had advanced approximately $4,000 to cover her living expenses. She repaid this loan after she received her settlement proceeds.

Twenty months after the death of Don Kahny, an ALJ heard Edna Kahny's LHWCA claim. The threshold issue was either Edna Kahny was the "widow" of Don Kahny within the intendment of the LHWCA. The ALJ allowed Arrow and Liberty Mutual an offset of the net amount received by EDna Kahny. He also allowed a credit for the $4,000 advanced by her attorneys. On appeal, the BRB affirmed the ALJ's award in its entirety.

ASSIGNMENTS OF ERROR

Arrow and Liberty Mutual contend that the ALJ and BRB erred in finding that Edna Kahny was entitled to a widow's benefits. They further contend that the ALJ and BRB erred in rejecting their defense under § 33(g) of the Act, 33 U.S. C. § 933(g). Specifically, Arrow and Liberty Mutual maintain consent, Edna Kahny forfeited all compensation benefits.

Edna Kahny contends that because of its unjustified refusal to pay compensation benefits, Arrow should not

be allowed an offset. Alternatively, she contends that the $4,000 advanced her attorneys should not be added to the amount of her net recovery in determining the offset total.

The Director of the Office of Workers' Compensation Programs, United States Department of Labor, maintains that the Arrow has no standing to invoke the bar of § 933(g) because Arrow waived the very subrogation rights that the section is designed to protect and because Arrow indemnified the platform owner from the tort claims brought by Edna Kahny. Although the Director recognized that our decision in Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Circ. 19809), is binding precedent for this panel, he questions the soundness of the decision and hopes for its ultimate reconsideration.

DISCUSSION

1. Is Edna Kahny a "widow" under LHWCA?

Only a decedent's widow is entitled to receive death benefits under the LHWCA. Section 2(16) of the Act, 33 U.S.C. § 902(16), defines widow, in pertinent part, as "the decedent's wife . . . living with or dependent for support upon him . . . at the time of his . . . death; or living apart for justifiable cause . . . ."

The ALJ found that Don and Edna Kahny were husband and wife and were living apart for justifiable cause at the time of Don Kahny's death. WE are bound to uphold the factual findings made by the ALJ if they are supported by substantial evidence in the record considered as a whole. Universal Camera Corp. v. NLRB,

340 U.S. 474 (1951).

The record before us abounds with support the for ALJ's findings. Edna and Don Kahny were married in 1971. They lived together in North Carolina until Labor Day 1978 when Don Kahny departed for Cameron, Louisiana to seek employment in the offshore oilfields. Edna Kahny visited her husband in October 1978, staying with him at a motel in which he was temporarily living. She then returned to North Carolina to stay with her mother until her husband was able to secure a suitable home. In December 1978, Don Kahny found a mobile home in Port Arthur, Texas. Moving plans were made. On February 28, 1979, Don Kahny was to use a U-Haul trailer to move his wife and step-daughter, if she so chose, to their new home. Don Kahny's death aborted these plans. Between September 1978 and February 22, 1979, Don Kahny sent his wife money in amounts commensurate with his earnings, and the couple corresponded regularly by telephone and letters. The record includes no evidence of significant marital discord.

It is apparent that the ALJ's finding is supported by substantial evidence. The Kahnys' temporary physical separation did not break the "conjugal nexus" required by Thompson vs. Lawson, 347 U.S. 334 (1954).

2. Was Edna Kahny a "person entitled to compensation?"

The second issue presented was whether Edna Kahny was a "person entitled to compensation" under 33 U.S.C. § 933(g), which provides:

> "If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made

(emphasis added). Although it is undisputed that Kahny neither obtained Arrow Contractors' prior written approval of her out-of-court settlement nor filed the proper form with the deputy commissioner, the BRB held that § 933(g) did no bar Kahny's right to compensation because, at the time of the settlement, Arrow Contractors was making no weekly benefits payments to Kahny, either voluntarily or pursuant to an ALJ's award. In O'Leary v. Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem, 622 F.2d 595 (9th Cir. 1980), the BRB held tha a claimant is a "person entitled to compensation" within the meaning of § 933(g) only if at the time of the settlement the employer is making weekly benefits payments either voluntarily or pursuant to an ALJ's award. Based upon its view that "the very language [of § 933(g)] contemplate[es] the [the] employer either be making voluntary payments under the ACt of [be] found liable for benefits by

a judicial determination," 7 BRBS at 148, the BRB concluded that to apply the bar of § 933(g) to a situation in which the employer is not making weekly benefits payments at the time of the settlement

> could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . . .

7 BRBS at 149.

We find this analysis fully consistent with the language, legislative history, and rational of § 933(g). The critical time for the determination whether on is a "person entitled to compensation" is the time of the challenged settlement. If, at that time, the employer is not making voluntary payments and no award has been ordered by an ALJ, the claimant is not a "person entitled to compensation" under § 933(g), and is not obliged to secure prior approval for a third-party tort settlement.

3. What is the effect of the payment of funeral benefits?

In the instant case Liberty Mutual reimbursed Edna Kahny $1,500.00, as required by 33 U.S. C. § 909(a), in partial payment of the funeral expenses. In the board sense, compensation includes the funeral expense allotment, but this is not the meaning of compensation eyes used in 33 U.S. C. § 933(g). Thus, there is no merit to Arrow's contention that the $1,500.00 funeral expenses draft magically converted Edna Kahny into a "person entitled to compensation" at the

very time her right to receive compensation benefits was being denied by Arrow and Liberty Mutual. We are not persuaded by that legal legerdemain. Section 933(g). Section 933(g) presents no bar to Kahny's recovery.

Having concluded that Edna Kahny was not a person entitled to compensation under § 933(g), we need not address the issue of Arrow's standing to assert the forfeiture provisions of that section. The Director maintains that since Arrow waived its subrogation rights and, further, agreed to indemnify the platform owner for any claims made by or on behalf of its employees, it should not be allowed to raise the shield of § 933(g). We defer the resolution of that question to another panel on another day.

4. Is Arrow entitled to offset the amount of Kahny's tort settlement?

Edna Kahny asserts that the BRB erred in setting off the net amount of the third-party settlement, claiming that the waiver of subrogation rights against the platform owner precluded Arrow from reaping the benefits of the setoff provision of 33 U.S.C. § 933(f). We do not agree. That section provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) the employer shall be required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

5. Amount of Offset:

The ALJ and BRB erred in computing the amount of offset. There is no evidence to support the allowance of a credit for

the $4,000 which the attorney made available to Edna Kahny to ease the financial distress occasioned by the death of her husband, as compounded by the failure and refusal of the employer and compensation carrier to pay timely a widow's benefits. In fact, the parties stipulated the amount of net recovery and that stipulation should have been taken as conclusive. The award is modified to delete that portion of the offset, thus allowing a total offset of $83,333.34.

The final order of the BRB, as modified herein, is AFFIRMED.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of the Claim for Compensation under the Longshoremen's and Harborworker's Compensation Act MARY V. O'LEARY, NO. 78-1339 Claimant-Respondent, v. SOUTHEAST STEVEDORE COMPANY and LIBERTY MUTUAL INSURANCE COMPANY, MEMORANDUM Petitioners, v. BENEFITS REVIEW BOARD, U.S. DEPARTMENT OF LABOR, Respondent.	)

Petition to Review a Decision of the Benefits Review Board

Before: SKELTON,* Judge, and FARRIS and PREGERSON,
Circuit Judges.

*The Honorable Byron G. Skelton,

Senior Judge of the United States Court of Claims, sitting by designation.

Southeast Stevedore Company and Liberty Mutual Insurance Company appeal the decision of the Benefits review Board awarding death benefits to Mrs. O'Leary under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. Southeast contends that because Mrs. O'Leary accepted a settlement and released her rights against Ketchikan Pulp Company, Section 33 (g) of the Longshoremen's Act, 33 U.S.C. Section 933 (g), barred her claim for the otherwise allowable death benefits. The Benefits Review Board held that Section 33(g) was not applicable for two reasons: 1) there was no final order awarding Mrs. O'Leary death benefits under the Act as the time she settled her third party claim, and 2) prior to the settlement, Southeast had refused to voluntarily pay Mrs. O'Leary compensation pending adjudication of her claim for death benefits under the Act.

Our scope of review is limited. We will uphold the Board's interpretation of the Longshoremen's Act if those interpretations are reasonable and reflect the policy of the Act. National Steel & Shibuilding Co. v. United States Dept. of Labor, 606 F.2d 875, 880 (9th Cir. 1979).

Section 33(g) provides:

> If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from

> the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

33 U.S.C. Section 933(g).

The Board reasoned that "the very language [of Section 33(g)] contemplat [es] that [the] employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination." 7 BRBS 144, 148 (1977). The Board concluded that a different interpretation,

> could result in a claimant not being paid any compensation, yet the Claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . . .

7 BRBS 144, 149 (1977).

Here, Southeast 1) never paid compensation voluntarily or pursuant to an award and 2) disclaimed any interest in Mrs. O'Leary's third party claim even though fully aware of the proposed settlement.

The dominant purpose of the Longshoremen's Act is to aid injured longshoremen and their dependents. Reed v. The Yaka, 373 U.S. 410 (1963). The Board's ruling is reasonable and furthers the underlying purpose of the Act.

Affirmed.

APPENDIX G

LEGISLATIVE HISTORY

The Bureau of the Budget has advised that there would be no objection to the submission of this legislative proposal to Congress.

Sincerely yours,

ARTHUR E. SUMMERFIELD,
Postmaster General.

HARBOR WORKERS - COMPENSATION-THIRD PARTY LIABILITY

For text of Act see p. 426

Senate Report no. 428, June 24, 1559 [To accompany H.R. 451]

House Report No. 229, Mar. 19, 1959 [To accompany H.R. 451]

The Senate Report No. 428

The Committee on Labor and Public Welfare, to whom was referred the bill (H>R. 451) to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of

compensation in cases where third persons are liable, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

BACKGROUND OF THE BILL

Like other workmen's compensation laws the Longshoremen's and Harbor Workers' Compensation Act involves a relinquishment of certain legal rights by employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault their liability to an injured workman is limited under the act. In some instances injury to an employee is caused by a third party. In such circumstances, section 33 of the act reserves to the employee the right to seek damages against the third party.

Section 5 of the Longshoremen's Act makes the statutory liability of an employer of the exclusive liability for injury to an employee arising out of employment. This section also reserves to the employee the right to recover damages against third parties causing injury.

Section 5 of the Longshoremen's Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of employment. This section also reserves the employee the right to recover damages against third parties causing injury.

However, in exercising his right to sue a third party for damages under section 33 of existing law, the employee

must choose whether to collect the compensation to which he is entitled or to pursue the third-party suit. He may not pursue both courses.

Existing law works on hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning a third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit--those who, in effect, purchases an injured employee's claim for their own monetary advantage.

PURPOSE OF THE BILL

The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. The principle underlying the modification of the law made by this bill, is embodied in most modern State workmen's compensation law.s The committee believes that in theory and practice this is sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle would be applied with due recognition of the equities and right of all who are involved.

Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee received four-fifths of the amount after necessary expenses, approved by the Deputy Commissioner, and all benefits and compensation have been deducted. Thus by giving the employer a reasonable (one-fifth) share in the net recovery an incentive is provided not to compromise a suit only for the amount of compensation but to protect the interests of the employee as much as possible.

The other major provision of the bill relates to the immunization of fellow employees against damage suits. The rational of this change in the law is that when an employee goes to work in a hazardous industry he encounters two risks. First, the risks inherent in the hazardous work and second, the risk that the might negligently hurt someone else and thereby incur a large common-law damage liability. While it is true that this provision limits an employee's rights, it would at the same time expand them by immunizing him against suits where he negligently injures a fellow worker. It simply means that rights and liabilities arising within the "employee family" will be settled within the framework of the Longshoremen's and Harbor Workers' Compensation Act.

The bill as amended by the committee provides greater protection to injured workers and corrects defects in existing

law. It carefully protects the interests of all who are involved and balances the equities. The bill as amended has the support of both labor and industry and the endorsement of both the Labor Department and the Bureau of the Budget. The views of the executive agencies are expressed in the letters which follow:

U.S. Department of Labor.
Office Of The Secretary
Washington, May 1, 1959.

Honorable Lister Hill,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, Washington, D.C.

Dear Senator Hill:

This is in further response to your request for a report on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable.

This bill would amend section 33 of the act, which describes the relative rights of employers and employees under the act when a third party is responsible for ran injury which is also compensable under the act. The primary purpose of the bill apparently is to eliminate the present requirement of an immediate election either to take benefits under the act or to pursue a remedy against the third party. Under certain circumstances, it would permit acceptance of compensation benefits and an action by the employee cr his representative against the third party. On the other hand, if compensation were accepted without instituting an action against the third party within the period allowed in the bill, the cause of action would be assigned to the carrier after it had

given the required notice. Two-thirds of any amount recovered by the carrier in excess of its compensation liability, after the deduction of reasonable expenses, would be payable to the employee of his eligible survivors.

In general, H.R. 451 appears to follow the pattern of the New York workmen's compensation law and would make significant changes with respect to the rights and liabilities of the parties in interest. This Department would not object in principle to what seems to be the primary purpose of the bill. However, it has several features which we find objectionable, for the reasons described in the enclosed comments on H.R. 451. We are enclsoing, as a substitute for H.R. 541, suggested language to remedy these defects. Also enclosed is a Ramseyer of the Department's amendment, and an explanation of this proposal.

Time has not permitted us to determine the views of the Bureaus of the Budget on the submission of this report.

Sincerely yours,

JAMES T. O'CONNELL,
Acting Secretary of Labor.

Executive Office Of The President,
Bureau Of The Budget,
Washington, D.C., May 22, 1959.

Honorable Lister Hill,
Chairman, Committee on Labor and Public Welfare, U.S. Senate, Washington, D.C.

Dear My Mr. Chairman: This is in reply to your letter of April 17, 1959, requesting the views of the Bureau of the Budget on H.R. 451, a bill to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the

payment of compensation in cases where third persons are liable.

As an attachment to its report, forwarded to your committee on May 1, 1959, the Department of Labor has submitted a substitute for H.R. 451 which accomplishes the major purpose of that bill while correcting certain of its features which were found to be objectionable.

The Bureau of the Budget concurs with the views of the Department of Labor and prefers enactment of the substitute bill proposed by that Department instead of H.R. 451.

Sincerely yours,

(Signed) PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.